No. 78-270

In the Supreme Court of the United States

OCTOBER TERM, 1978

FEDERAL COMMUNICATIONS COMMISSION, PETITIONER

v.

MCI TELECOMMUNICATIONS CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONER'S REPLY TO "BRIEF FOR THE UNITED STATES IN OPPOSITION"

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The United States, through the Solicitor General,[1] has opposed the petition of the Federal Communica-

[1] Because the Solicitor General obviously does not represent the Commission here and because the Department of Justice did not participate in the D.C. Circuit proceedings which led to the *Execunet II* decision, we question exactly what interests of the United States the Solicitor legitimately represents in this case. This situation is especially troubling because on

tions Commission and the companion petitions of the United States Independent Telephone Association (No. 78-216) and the American Telephone and Telegraph Co. (No. 78-217).

1. The United States makes no attempt to reconcile its position now with the brief it filed on behalf of the FCC successfully opposing the petition of AT&T for certiorari to the Third Circuit in *Bell Telephone Co. of Penn.* v. *FCC*, the decision which conflicts with the D.C. Circuit decision here under review.[2] In that brief,[3] which explicitly distinguished "private line" service from MTS/WATS-type services,[4] the United States assured this Court that AT&T was afforded adequate notice in the FCC's interconnection proceedings and that the interconnection orders were not overbroad, because the orders were limited to interconnection for private line services.

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another occasion before this Court, the Solicitor did represent the Commission with respect to the same Commission orders that are now under review, and, at that time, pressed on our behalf an interpretation of those orders that is consistent with our present petition and inconsistent with the Solicitor General's present opposition. See Brief for the Respondents in Opposition, *AT&T* v. *FCC*, No. 74-1229, *cert. denied*, 422 U.S. 1026, *reh. denied*, 423 U.S. 886 (1975). Even now, in its brief on behalf of some unspecified government interest, the Solicitor concedes that the petition is "not without some force." U.S. Opposition 11.

[2] 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026, *reh. denied*, 423 U.S. 886 (1975).

[3] Brief for the Respondents in Opposition, *supra* n.1, No. 74-1229.

[4] *Id.* at 8.

Tracking the Third Circuit's opinion, the brief explained that AT&T had notice "that the inquiry encompassed all *private line* service offerings * * *." Brief in No. 74-1229, p. 16 (emphasis added). The brief relied upon the fact that the Third Circuit's (and the FCC's) "computations of possible revenue diversions from AT&T were based upon AT&T's total revenues from all *private line* services * * *." *Id.* at 17 n. 9 (emphasis added).[5] The brief also described the FCC's *Specialized Common Carrier Services* proceeding,[6] which was the source of the interconnection obligation as well as the policy of competition, as a rulemaking to determine "whether to open AT&T's near monopoly in *private line* service to competition and [to select] the means of insuring that new competitors would obtain local distribution." *Id.* at 12 (emphasis added). It concluded, quoting the Third Circuit, that AT&T had a fair opportunity to "present its arguments against the *proposed* interconnection." *Id.* (emphasis added).

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[5] Compare that analysis with the FCC's analysis of the scope of interconnection at Pet. 23-24 in this case.

[6] 29 FCC 2d 870, 31 FCC 2d 1106 (1971), *aff'd sub nom. Washington Util. & Transp. Comm'n* v. *FCC*, 513 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975). See also Brief for the Federal Respondents in Opposition to certiorari in that case, *National Ass'n of Regulatory Utility Commissioners* v. *FCC*, No. 74-1550, where the FCC and the United States, through the Solicitor General, characterized the case as involving only "private line service" or "specialized communications services," as contrasted with public telephone service. Brief, pp. 2, 3, 5, 6.

In response to AT&T's argument that the interconnection order was "impermissibly overbroad," the brief relied once again on the Third Circuit's analysis. It argued that the interconnection obligation "must be read in context as requiring AT&T to furnish those interconnection 'elements of *private line* services which AT&T supplies to its affiliates and furnishes to customers through its Long Lines Department' * * *." *Id.* 20 n. 10 (emphasis added). Such a requirement, the brief concluded, "is not overbroad." [7] *Id.*

We submit that the brief in No. 74-1229 is irreconcilable with points 1 and 2 of the brief for the United States in this case.[8] The brief in No. 74-1229 was intended to assure this Court that certiorari was unwarranted, in large part because the "notice" and "overbreadth" arguments of AT&T presupposed broader orders than the Commission had issued. The

[7] In addition to the quoted portions, the general tenor of the brief in No. 74-1229 presupposes a limited interconnection obligation. The brief plainly intended to persuade this Court that AT&T's complaints of an unbounded obligation were unfounded.

[8] This is not merely a debating point, of course, intended to show that the United States has not been consistent. Our argument is that the Third Circuit decision was correct and controls the interconnection question, and that the United States was correct in its brief in No. 74-1229 but wrong in its contradictory brief in this case. As we pointed out in our petition, the Third Circuit explicitly decided that the Commission had excluded MTS and WATS from consideration in its interconnection inquiry. Pet. 24. See AT&T Pet. App. 34g. See also Pet. 17 n. 20.

United States' brief in this case is intended to assure the Court that there was no error below in construing the same interconnection orders so broadly as to have no bounds. The United States may not have it both ways.

2. The United States apparently regards as significant the FCC's statement in the declaratory ruling (Pet. App. 39C-40C) that its specialized carrier policy embraced some specialized services the established carriers had not theretofore regarded as "private line." U.S. Opposition 13. But the Commission there was merely recognizing that one of the specialized carrier applicants, the Data Transmission Corp., had proposed an end-to-end all digital data network that included switching. Concededly, this was not a traditional private line service; but it surely was a far cry from ordinary long distance telephone service (MTS). See *Specialized Common Carrier Services*, 29 FCC 2d 870, 874-76 (1971).

The crucial fact, however, is that none of the applicants in the *Specialized Common Carrier* proceeding proposed anything resembling MTS or WATS or Execunet service. *Those* classes of service therefore were excluded from the Commission's consideration —both for purposes of Section 214 certificates and for purposes of interconnection pursuant to Section 201(a). Pet. App. 39C-41C. Our argument is that the exclusion of such services as MTS, WATS and equivalent services from consideration meant that the Commission could not have ordered interconnection for the purpose of providing those services. *Id.* This

was so because, as the Commission reasoned in its declaratory ruling, a contrary decision would mean that "all the telephone companies were deprived of a meaningful opportunity for a hearing with respect to the public interest consequences * * * of such interconnection." Pet. App. 41C. Thus, the Commission's candid explanation of its reading of *Specialized Common Carrier Services* does not undercut in any way its conclusion that AT&T had no obligation, under outstanding FCC orders pursuant to Section 201(a), to provide interconnection facilities that would enable MCI and others to offer MTS, WATS and equivalent services such as Execunet.

It is one thing to concede, as the Commission did in its declaratory ruling, that the bounds of the interconnection obligation were a little bit fuzzier and less precise than the Third Circuit had articulated them. It is quite another thing to assert, as the Solicitor General's brief and the D.C. Circuit's opinion would do, that the interconnection limitations imposed by the Commission and affirmed by the Third Circuit have no substance, so that the orders in fact were "unbounded." The Solicitor and the D.C. Circuit perceive universal interconnection obligations that reach MTS, WATS, and equivalent services such as Execunet. It requires no "literal reading" of the Third Circuit's opinion to find a direct conflict with that perception. U.S. Opposition 13.

3. The United States cannot "see how the decisions below can significantly impair the Commission's performance of its statutory responsibility." U.S. Opposition 14. Nor does it see any "important or recurring issue of administrative or communications law" that would warrant this Court's attention. *Id.*

It is true that the Commission has commenced a broad inquiry (the MTS/WATS inquiry) into long distance telephone service competition, which will consider interconnection issues as well as certification issues.[9] But that inquiry likely will take years to complete, because the issues are complex and the policy ramifications are far reaching. In the meantime, judge-made policy will govern this important segment of public utility service. The Commission must make day-to-day regulatory decisions on new tariff filings by MCI and other specialized carriers for MTS/WATS-equivalent services, as well as any tariffs AT&T or another telephone company files to provide interconnection. The D.C. Circuit's command that the FCC do nothing to impede "MCI's right to enter the market now", Pet. App. 10E, will substantially influence the FCC's decisions on those matters.

Whether the FCC theoretically will be able to reclaim its proper policy-making role after completion of the MTS/WATS inquiry, we submit, is beside the point. The D.C. Circuit's decisions, in effect, have turned Congress' scheme for the regulation of com-

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[9] *In the Matter of MTS and WATS Market Structure*, FCC 78-144, released February 28, 1978 ("MTS/WATS Inquiry"). We pointed out this proceeding to the Court at Petition, p. 13 and n. 15, and Petitioner's Reply, n. 26 at p. 14.

munications on its head.[10] They have established judge-made policy which will prevail unless and until the FCC, after affording due administrative process, can make a decision that will pass muster with the same judges who established the prevailing policy. This raises issues that are both important and, in this very case, recurring. The Court should grant the petition for certiorari.

Respectfully submitted,

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[10] The United States apparently finds it unimportant to have the anomalous situation of a regulatory agency setting out to make public interest findings that will either affirm or reverse the policy decisions of the court of appeals.

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